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No. ———

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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GLASS PACKAGING INSTITUTE, *et al.*,
*Petitioners*

v.

DONALD T. REGAN, *et al.*,
*Respondents*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## QUESTIONS PRESENTED

1. Whether a court may properly deny standing to parties directly injured by unlawful agency action through the application of the zone of interests test where all remaining elements of the standing doctrine are met and there are no compelling reasons to withhold judicial review?

2. Whether the zone of interests standing test should be clarified or, in the alternative, overruled by this Court?

## PARTIES TO THE PROCEEDING

The Petitioners in this case are the Glass Packaging Institute, a trade association representing, *inter alia*, manufacturers of glass bottles and the president of the association, William W. Sadd. Respondents are Donald T. Regan (in his capacity as Secretary of the Treaury), Stephen E. Higgins (in his capacity as Acting Director of the Bureau of Alcohol, Tobacco and Firearms), and, by their voluntary intervention, The Society of the Plastics Industry, Inc., a trade association representing, *inter alia*, manufacturers of beverage containers made of polyethylene terephthalate.

The Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on June 8, 1984.

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### CITATION OF OPINIONS BELOW

The Opinion of the Court of Appeals for the District of Columbia Circuit is reported at —— F.2d —— (D.C. Cir. 1984) and is included in the Appendix for Petitioners submitted herein, commencing at page A-1. The Opinion and Order of the United States District Court for the District of Columbia have not been reported and appear in the appendix for Petitioners, commencing at page A-24.

### JURISDICTION

The judgment of the Court of Appeals was entered on June 8, 1984 (Appendix for the Petitioners at page A-24). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES AND REGULATIONS

Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553 (1976):

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits or contracts.

(b) General notice of proposed rulemaking shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rulemaking proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretive rules, general statements of policy, or rules of agency organization, procedure or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretive rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

Section 5301(a) of the Internal Revenue Code, 26 U.S.C. § 5301(a) (1976 & Supp. V 1981):

Whenever in his judgment such action is necessary to protect the revenue, the Secretary is authorized, by the regulations prescribed by him and permits issued thereunder if required by him—

(1) to regulate the kind, size, branding, marking, sale, resale, possession, use, and reuse of containers (of a capacity of not more than 5 wine gallons) designed or intended for use for the sale of distilled spirits (within the meaning of such term as it is

used in section 5002(a)(8)) for other than industrial use; and

(2) to require of persons manufacturing, dealing in, or using any such containers, the submission to such inspection, the keeping of such records, and the filing of such reports as may be deemed by him reasonably necessary in connection therewith.

Any requirements imposed under this section shall be in addition to any other requirements imposed by, or pursuant to, law and shall apply as well to persons not liable for tax under the internal revenue laws as to persons so liable.

## STATEMENT OF THE CASE

This case arises out of Petitioners' effort to obtain judicial review of the failure of the Bureau of Alcohol, Tobacco and Firearms ("BATF") to comply with the procedural requirements of the Administrative Procedure Act while purporting to approve the substance polyethylene terephthalate ("PET") for use in the packaging of distilled spirits. This action was commenced on November 3, 1982 by Petitioners Glass Packaging Institute and William W. Sadd (collectively "GPI") to enjoin the BATF from granting approval of PET without first conducting a rulemaking proceeding in which Petitioners and other interested members of the public could participate and which Petitioners alleged was required by section 4 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553.[1] The jurisdiction of the District Court was invoked under 28 U.S.C. § 1331(a) and 28 U.S.C. § 1361.

In deciding to approve PET as a substance for use in the packaging of distilled spirits, the BATF acted under

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[1] Petitioners also challenged the BATF's alleged failure to comply with the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(c). The Court of Appeals disposed of this allegation on the merits in its June 8, 1984 decision, and Petitioners are not seeking review of this claim.

authority granted by section 5301(a) of the Internal Revenue Code, 26 U.S.C. § 5301(a) (1976 & Supp. V 1981). Under this statutory provision, the Secretary of the Treasury is directed to prescribe "by regulations" the kinds of containers which may be used for the packaging of distilled spirits.

Petitioners alleged in their complaint below that the BATF's ruling was substantive in nature and therefore subject to the informal "notice and comment" rulemaking requirements of 5 U.S.C. § 553. Petitioners further alleged, and the Court of Appeals found, that the BATF's action permits distillers to package their products in containers which they were legally prohibited from using prior to the agency's purported approval of PET. (Appendix at A-9). Finally, the Petitioners alleged that they would suffer significant competitive injury as a direct result of the BATF's approval of PET. The Court of Appeals recognized that this allegation had been proven as well. (Appendix at A-9).

On February 28, 1983 the District Court, while granting Respondents' motion for summary judgment, held that the BATF's ruling approving the use of PET was merely an interpretive rule, and therefore, by reason of the exception in 5 U.S.C. § 553(b)(3)(A), not subject to the notice and comment requirement of the APA. In its memorandum opinion, the District Court expressly rejected arguments raised by Respondents that GPI lacked standing to challenge the BATF's failure to comply with the APA. (Appendix at A-26). Petitioners filed a timely notice of appeal.[2]

On June 8, 1984, the United States Court of Appeals for the District of Columbia Circuit affirmed the judgment of the District Court. The court did not, however, consider the merits of Petitioners' claim that the BATF had acted in contravention of the APA. Instead, the

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[2] Set out in Appendix at A-34.

court held that neither GPI nor William W. Sadd had standing to contest the legality of the BATF's decision.[3]

In reaching its decision, the Court of Appeals expressly found that all constitutionally mandated standing requirements had been satisfied by Petitioners (Appendix at A-9). The court's opinion also recognized, albeit implicitly, that GPI had satisfied the prudential considerations related to standing which require a plaintiff to assert his own rights, and not those of a third party, and to assert an individualized, as opposed to a generalized, grievance. (Appendix at A-9, 10). Nevertheless, the Court of Appeals held that GPI lacked standing to challenge the Bureau's action based on its interpretation of the zone of interests test established by this Court in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). In applying the test the court found that the interest asserted by GPI—"the right to market distilled beverage containers free of competition from containers approved in an illegal fashion"[4]—is not an interest intended to be protected by Congress under 26 U.S.C. § 5301(a).[5]

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[3] The question of Petitioners' standing to challenge the BATF's action under the APA was first raised on appeal by the Court of Appeals, *sua sponte*, during oral argument on November 16, 1983. Petitioners' motion to file a Supplemental Brief Addressing the Question of Standing was granted by the court on December 12, 1983, and Petitioners' brief was accepted by the court on that date. *See* Appendix at A-35. Respondents Donald T. Regan and The Society of the Plastics Industry, Inc. also filed supplemental briefs with the Court of Appeals addressing the question of standing. *See* Appendix at A-35, 36.

[4] Appendix at A-10.

[5] The Court of Appeals concluded that the only interest intended to be protected or regulated by 26 U.S.C. § 5301(a) is the protection of the revenue. (Appendix at A-11). The decision thus effectively denies standing to contest BATF actions under § 5301(a) to anyone except the Secretary himself, the only person with a sufficiently individualized interest in the protection of the revenue

## REASONS FOR GRANTING THE WRIT

### A. Introduction

This case involves a federal question of substantial importance which the Court of Appeals has decided in a manner inconsistent with the decisions of this Court: whether, in the absence of any compelling reason to withhold judicial review, the zone of interests test may be relied upon by a court as the sole basis for denying standing to challenge unlawful agency action? If the decision in the Court of Appeals below is permitted to stand, GPI respectfully submits that a broad range of agency actions will be insulated from judicial review, even when they are taken in contravention of the Congressionally mandated requirements of the APA.

In finding that Petitioners lacked standing to challenge the BATF's failure to comply with the APA the Court of Appeals misapplied the decision of this Court in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). Consequently, the court's decision is in conflict with *Data Processing* and a number of related decisions of this Court.

Accordingly, this Court should review the decision of the District of Columbia Circuit in this case and, upon review, reverse that decision.

### B. The Decision of the Court of Appeals Conflicts With The Applicable Decisions Of This Court and Effectively Immunizes Unlawful Agency Action From Judicial Review

In *Valley Forge Christian College v. Americans United For Separation of Church and State*, 454 U.S. 464 (1982), this Court stated that, as "an irreducible constitutional minimum," a party seeking to invoke the au-

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to support a claim of standing. *See, e.g., Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 80 (1978).

thority of a federal court must: 1) "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant;" 2) show that the injury "fairly can be traced to the challenged action;" and 3) show that the injury "is likely to be redressed by a favorable decision." *Id.* at 472. Beyond these constitutional prerequisites to bringing suit in the federal courts, the *Valley Forge* Court observed that "a set of prudential principles that bear on the question of standing . . ." have been developed in prior decisions of this Court. 454 U.S. at 474.[6] Unlike the constitutionally based elements of standing, which must be demonstrated prior to invoking the authority of a federal court, these remaining elements of the standing doctrine were characterized by this Court as "merely . . . factor[s] to be balanced in the weighing of so-called 'prudential' considerations." 454 U.S. at 475. This Court has also stated that the prudential considerations which bear upon standing are not to be "appl[ied] . . . to all cases as a matter of course," *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 80 (1978), but are instead to be "applied in appropriate circumstances." *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 100 n.6 (1979) (referring specifically to zone of interests test).

In *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970), and its

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[6] The prudential principles bearing on standing are the following: 1) "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim on the legal rights or interests of third parties . . . ;" 2) the Court will "refrain[] from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches;" and 3) the Court has on occasion inquired as to whether "the plaintiff's complaint fall[s] within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Valley Forge*, 454 U.S. at 474-75 & n.12.

progeny,[7] this Court identified as one of the prudential considerations which might bear upon the question of standing the inquiry "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." The Court's articulation of the zone of interests test was prompted by the "trend . . . toward enlargement of the class of people who may protest administrative action." 397 U.S. at 154. In furtherance of this trend, the zone of interests test was adopted to replace the more restrictive "legal interest" test which had prevailed in the federal courts, and which had been applied by the lower court in *Data Processing*.[8]

Thus, Petitioners submit that the Court of Appeals decision in this case miscomprehends and conflicts with the *Data Processing* line of cases in two critical respects: first, the Court of Appeals utilized the zone of interests test, adopted by this Court to relax prudential restraints on standing to protest administrative action, in a manner which significantly curtails access to the courts for persons aggrieved by the unlawful action of a federal agency; and second, by requiring Petitioners to demonstrate that the interest they asserted was intended to be regulated or protected by § 5301(a), the court below in effect revived the "legal interest" test which this Court specifically rejected as a test for standing.

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[7] *Investment Company Institute v. Camp*, 401 U.S. 617 (1971); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970).

[8] The Court of Appeals in *Data Processing* had required the plaintiff to demonstrate that it was asserting a "legal interest," that is, one founded in a contract or statute. 406 F.2d 837, 842-43 (4th Cir. 1969). In rejecting the legal interest test as a prudential element of the standing doctrine, this Court expressly stated that "the existence or non-existence of a 'legal interest' is a matter quite distinct from the problem of standing." 397 U.S. at 153 n.1. *See also Barlow v. Collins*, 397 U.S. 159, 163-65 (1970).

It is also apparent that if the opinion of the Court of Appeals in this case were to be applied to the facts which were before this Court in *Data Processing*, the Court of Appeals' reasoning would produce a result contrary to that reached by this Court. In *Data Processing* a trade association representing sellers of data processing services brought suit to challenge a ruling by the Comptroller of the Currency which permitted banks to make such services available to other banks and bank customers. The injury asserted by the plaintiffs was the loss of profits due to increased competition from the entry of banks into the data processing services market. 397 U.S. at 152. This Court, applying the zone of interests test, held that plaintiffs had standing.

The interest sought to be vindicated in *Data Processing* —the relative competitive position of data processing service companies—would not, under the restrictive reasoning of the decision below, have provided a sufficient basis upon which to confer standing. Rather, in conflict with this Court's holding, the Court of Appeals reasoning would have required it to conclude that the competitive interests of the data processing service companies were not intended to be protected or regulated by § 4 of the Bank Service Corporation Act,[9] and that judicial review was foreclosed.

The similarity between the *Data Processing* case and the instant case is compelling. Furthermore, the *Data Processing* decision is solidly buttressed by this Court's subsequent decisions in *Investment Co. Institute v. Camp*, 401 U.S. 617 (1971) (open-end investment companies have standing under § 4 of Bank Service Corporation

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[9] The legislative history of § 4 of the Bank Service Corporation Act of 1962, the statute identified by the Court as relevant for zone of interests purposes in *Data Processing*, states that the provision was intended to promote *competition among banks* of different sizes. *See* Sen. Rep. No. 2105, 87th Cong., 2d Sess. 2-4 *reprinted in* 1962 U.S. Code Cong. & Admin. News 3878, 3879-81.

Act to challenge ruling permitting banks to establish and operate collective investment funds) and *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970) (travel agents have standing under § 4 of Bank Service Corporation Act to challenge ruling permitting banks to provide travel services). Thus, it is evident that the decision of the Court of Appeals in this case simply cannot be squared with this Court's decisions stating and applying the zone of interests test.

No decision of this Court has ever applied the zone of interests test to deny standing to a litigant. Moreover, in a number of cases decided since *Data Processing*, this Court has rejected objections that certain plaintiffs lacked standing while declining to apply the zone test, even though application of the test arguably would have yielded a different result. *See, e.g., Bryant v. Yellen*, 447 U.S. 352, 366-68 (1980) (prospective purchasers who could reap windfall profits on resale of land, the market value and availability of which would be affected by applicability of a limitation on the amount of such land eligible for irrigation under federal reclamation law, found to have standing to contest agency decision that limitation was inapplicable); *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 74 (1978) (plaintiffs, who alleged various injuries they would suffer if nuclear plant were constructed, found to have standing to challenge constitutionality of statute limiting liability of plant operators for nuclear disasters); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (standing of promoter of product to assert constitutional rights of users of product upheld, even though promoter's interest not within zone). Read in conjunction with *Data Processing* and its progeny, these decisions indicate that, in the absence of compelling circumstances which might require a court to withhold judicial review,[10] it is not proper for a court to

[10] The basis upon which this Court has developed the prudential considerations which bear upon standing is its concern that the

apply the zone of interests test to deny standing to parties injured by federal agency action who are able to satisfy the constitutional prerequisites of standing. *See also Duke Power Co.*, 438 U.S. at 80 ("Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the stand-

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federal courts might unduly interfere with the activities of the other co-equal branches of the Government. *See, e.g., Warth v. Selden*, 422 U.S. 490, 498-500 (1975). *See also Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130, 140 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978) ("the zone test serves the purpose of allowing courts to define those instances when it believes the exercise of its power . . . is not congruent with the mandate of the legislative branch in a particular subject area."). The application of the zone test by the court below, however, did not prevent the court from interfering with a mandate of the legislative branch. Rather, assuming Petitioners' allegation that BATF failed to comply with the APA to be correct, *see Warth v. Seldin*, 422 U.S. at 501, the Court of Appeals' decision frustrated the will of Congress as expressed in the APA while upholding no discernible Congressional interest under 26 U.S.C. § 5301(a). In such an instance, proper concern for the prerogative of the legislative branch would appear to require a court to review, rather than abstain from reviewing, an agency's alleged unlawful action.

The need for prudence in the exercise of judicial power should not obscure the important public policy concerns intended to be addressed by the APA. The APA is premised upon Congress' recognition that comments from interested persons would serve as a valuable check on arbitrary or ill-conceived agency action and that even persons with a narrow self-serving interest—and perhaps especially those persons—would provide a valuable source of criticism of agency action. Thus, it is not the source of the comments, but rather their merits, that were foremost in Congress' mind. While the prudential zone of interests test may be useful in avoiding conflicts between the judicial and other branches of government in those instances where Congress has given some indication that it desired to foreclose judicial review, where there is no evidence of such Congressional intent the zone test should not be utilized to insulate agency decisionmaking from the public input contemplated by the APA.

ing doctrine are generally satisfied when the constitutional requisites are met.").

The effect of the Court of Appeals decision denying Petitioners standing is to insulate the BATF's action from judicial review. Since the Court of Appeals' decision denies standing to the parties most directly affected by the Bureau's action, *i.e.*, the Petitioners, the decision necessarily denies standing to all other persons, such as consumers and producers of distilled spirits, who may also be affected by that action. In essence, the Court of Appeals held that the BATF's alleged failure to comply with the APA is not subject to judicial review, and did so without finding any evidence that Congress intended to preclude such review.

This result is in direct conflict with the governing rule as stated by this Court: "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). *See also Rush v. Cort*, 369 U.S. 367, 380 (1962) (only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review). No evidence of Congressional intent to withhold judicial review is found in 26 U.S.C. § 5301(a), the statutory provision which authorizes the BATF to approve containers for distilled spirits. Thus, judicial review of the BATF's action should not be withheld. The decision of the court below, however, has turned the Congressional intent inquiry mandated by *Abbott Laboratories* on its head by requiring a plaintiff to demonstrate evidence of Congressional intent to *provide for* judicial review. Such a requirement cannot be squared with this Court's decision in *Abbott Laboratories*, where it stated: "The Administrative Procedure Act provides specifically not only for review of '[a]gency action made reviewable by statute', but also for review of 'final agency action for which

there is no other adequate remedy in a court', . . . ." 397 U.S. at 140.[11]

The decision of the Court of Appeals in the instant case is in direct conflict with the decisions of this Court which have stated and applied the zone of interests test, as well as the decisions of this Court which have addressed the availability of judicial review under the APA. Moreover, if allowed to stand, the decision will effectively foreclose judicial review of a wide range of federal agency decisions.[12] This result could not have

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[11] The Court of Appeals' opinion also failed to identify any compelling reasons for its denial of standing to Petitioners. Rather, the court required Petitioners to advance compelling reasons for the court to grant standing. (Appendix at A-15.) Such a requirement is inconsistent with this Court's decisions in *Abbott Laboratories* and *Rush v. Cort.*

[12] For example, the BATF is also authorized pursuant to 26 U.S.C. § 5301(a) to regulate the *size* of liquor bottles. In the past, the BATF has conducted notice and comment rulemaking when establishing permissible liquor bottle sizes. *See, e.g., Goldstein v. Miller*, 488 F. Supp. 156, 158-60 (D.M.d. 1980), *aff'd mem.*, 649 F.2d 863, 864 (4th Cir.), *cert. denied*, 454 U.S. 828 (1981). Respondents have recognized that "[t]he choice of permissible sizes for liquor bottles potentially affects a broad range of public interests and diverse groups and is a matter on which ATF needs public comment so that it can make an informed decision." Brief for Intervenor-Defendant Appellee The Society Of The Plastics Industry, Inc. (filed with the Court of Appeals in the proceedings below) at 21. The Court of Appeals decision in this case, however, applies with equal force to such BATF rulings and, consequently, neither the Society of the Plastics Industry nor any other party, except the Secretary of the Treasury, will have standing to challenge future BATF rulings establishing mandatory liquor bottle sizes, whether or not a notice and comment rulemaking proceeding is conducted.

Nor is the Court of Appeals decision limited to the actions of the BATF. Because of the large number of cases brought in the District of Columbia Circuit challenging actions by Federal agencies, the manner in which the Court of Appeals applies the zone test will have a broad impact on the ability of persons injured by

been intended by Congress nor by this Court and therefore, the Court should grant the Petition for a Writ of Certiorari upon this question.

### C. The Zone of Interest Test Has Been Applied By The Lower Federal Courts In a Confusing And Inconsistent Manner and Should Be Clarified Or Overruled By This Court

In the wake of this Court's decision in *Data Processing* there has been a large number of lower court decisions which have reached inconsistent, conflicting, and often illogical conclusions about the requirements for standing and the appropriate application of the zone of interests test. In *Upper Pecos Association v. Stans*, 452 F.2d 1233, 1235 (10th Cir. 1971), *vacated on other grounds*, 409 U.S. 1021 (1972), for example, the Tenth Circuit, answering a challenge to plaintiffs' standing to contest a violation of the National Environmental Policy Act, concluded that "[t]he [plaintiffs'] interests are within the zone protected by the APA." The court's focus upon the APA, rather than the statute under which the agency acted, *i.e.*, NEPA, is inconsistent with the manner in which this Court has applied the zone test. *See Data Processing*, 397 U.S. at 153-56. Nevertheless, it is beyond peradventure that GPI's interest in receiving notice and an opportunity to comment would fall within the zone of interests protected or regulated by the APA. Thus, GPI would have standing under the Tenth Circuit's application of the zone test in *Upper Pecos*.

In *Florida v. Weinberger*, 492 F.2d 488, 494 (5th Cir. 1974), the Fifth Circuit found that the state of Florida

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the action of any federal agency to obtain judicial review of such action. For example, the court has already applied the zone test to insulate alleged illegal actions of the Defense Department, *see Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838 (D.C. Cir. 1982), and the Internal Revenue Service, *see Tax Analysts and Advocates v. Blumenthal*, 566 F.2d 130 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978), from judicial review.

had standing to challenge a federal agency regulation by simply declining to apply the zone of interests test. The zone test was similarly ignored by the Fourth Circuit in *William F. Wilke, Inc. v. Department of Army of United States*, 485 F.2d 180 (4th Cir. 1973). The approach to standing taken in these decisions, *i.e.*, declining to apply the zone test where the constitutionally mandated requirements of standing are satisfied and no compelling reasons to deny standing are present, is consistent with the manner in which this Court has decided a number of post *Data Processing* cases. *See* pp. 11-13, *supra*. The court below found that Petitioners in this case satisfied all elements of standing, both constitutional and prudential, except the zone of interests test. Thus, Petitioners would have standing under the analysis employed by both the *Weinberger* and *William F. Wilke* courts.

Finally, in *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208, 1212 n.4 (8th Cir. 1972), the Eighth Circuit expressly stated its disagreement with the zone test: "We think that all that is required for a plaintiff to have standing to sue for a constitutional or statutory violation is a showing of 'injury in fact.'"

In view of these decisions, the present state of the law on the application of the zone of interests test is perhaps best characterized by the following statement of the Court of Appeals for the District of Columbia Circuit in *Control Data Corp. v. Baldridge*, 655 F.2d 283, 293 (D.C. Cir.), *cert. denied*, 454 U.S. 881 (1981): "A survey of this law reveals, however, more variety than uniformity among the approaches to the zone test."

The confusing and often inconsistent manner in which the zone of interests test is being applied by the lower federal courts has led to the disturbing development that access to the federal courts for persons aggrieved by agency action is not being granted in an even handed manner throughout this country. Accordingly, the Petition for a Writ of Certiorari should be granted so that

this Court may consider clarifying the zone of interests test for standing in order to insure that judicial review of allegedly unlawful agency action is granted on a consistent basis throughout the federal court system.

In the alternative, Petitioners respectfully request this Court to consider specifically repudiating the zone of interests test as a measure of standing. Such action would be wholly consistent with the principles which govern this Court's deliberations. In *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), this Court overruled its earlier decision in *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967), while offering the following explanation for its action:

> Although *Schwinn* is supported by the principle of *stare decises*, . . . we are convinced that the need for clarification of the law in this area justifies reconsideration. . . . Since its announcement, *Schwinn* has been the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts. . . . In our view, the experience of the last 10 years should be brought to bear on this subject of considerable commercial importance.

433 U.S. at 47-49 (footnotes omitted). Similar confusion and controversy in both the courts[13] and the scholarly journals[14] has attended the application of the zone of in-

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[13] *See, e.g., American Friends Service Committee v. Webster*, 720 F.2d 29, 49-52 (D.C. Cir. 1983); *Copper & Brass Fabricators Council, Inc. v. Dept. of the Treasury*, 679 F.2d 951, 953-55 (D.C. Cir. 1982) (Ginsburg, J., concurring in the result) (requesting clarification of zone test from the Supreme Court). *See also Barlow v. Collins*, 397 U.S. 159, 167-70 (1970) (Brennan, J. joined by White, J., concurring in the result and dissenting) (the zone test "encourages badly reasoned decisions which may well deny justice in this complex field.")

[14] *See, e.g.*, Davis, Standing, 1976, 72 *Nw. U.L. Rev.* 69 (1977); 4 K. Davis, Administrative Law Treatise § 24.17 (2d ed. 1983); Albert, Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief, 83 *Yale L.J.* 425, 493-97 (1974); Garvey, A Litigation Primer for Standing Dismissals, 55

terests test since it was announced in *Data Processing*. Thus, the need for clarification of the standing doctrine justifies this Court's reconsideration of the zone of interests test as a measure of standing and the impact of the test upon the rights of persons injured by federal agency actions.

## CONCLUSION

The decision of the Court of Appeals for the District of Columbia Circuit, applying the zone of interests test as the sole basis for denying Petitioners' standing to challenge unlawful agency action, is inconsistent with a number of decisions of this Court. Moreover, the decision effectively immunizes unlawful agency action from judicial review. The manner in which the Court of Appeals decided this case accurately reflects the level of disarray and confusion concerning the application of the zone of interests test in the lower federal courts. Accordingly, the Petition for a Writ of Certiorari should be granted by this Court to clarify the requirements for standing to challenge alleged unlawful agency action or in the alternative, to reconsider the zone of interests test as a measure of standing.

Respectfully submitted,

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*N.Y.U. L. Rev.* 545, 567-69 (1980); Sedler, Standing, Justiciability, and All That: A Behavioral Analysis, 25 *Vand. L. Rev.* 479, 486-91 (1972).

# APPENDIX

# APPENDIX

## UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 83-1390

GLASS PACKAGING INSTITUTE, *et al.*,
*Appellants*

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*

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Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 82-03142)

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Argued 16 November 1983

Decided 8 June 1984

*Michael S. Kelly*, with whom *Miles W. Kirkpatrick*, *Caswell O. Hobbs, III*, *Janine Sweeney Frias* and *Scott Stempel*, were on the brief for appellants. *Howard T. Weir* also entered an appearance for appellants.

*Joseph W. Lobue*, Assistant United States Attorney, with whom *Stanley S. Harris*, United States Attorney, *Royce C. Lamberth*, *R. Craig Lawrence*, and *Michael J. Ryan*, Assistant United States Attorneys, and *Robert M. Tobiassen*, Attorney, Bureau of Alcohol, Tobacco and Firearms, were on the brieffi for appellees Regan, Secretary of Treasury, et al. *Lee S. Strickland*, Assistant

United States Attorney, also entered an appearance for appellees, Regan, Secretary of Treasury, et al.

*Jerome H. Heckman*, with whom *John B. Dubeck*, *Peter L. de la Cruz* and *Ilene R. Heller*, were on the brief for appellee Society of Plastics Industry, Inc.

Before: WILKEY and GINSBURG, *Circuit Judges*, and MACKINNON, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* WILKEY.

WILKEY, *Circuit Judge*: The Glass Packaging Institute, a trade association of glass bottle manufacturers, and its president, William W. Sadd, brought this suit to block a decision by the Bureau of Alcohol, Tobacco and Firearms permitting liquor to be packaged and sold in plastic polyethylene terephthalate bottles. The plaintiffs argue that this administrative ruling is unlawful because it was promulgated without notice and comment. They also assert that the risk of criminal tampering with polyethylene terephthalate bottles should have been considered in the environmental assessment prepared by the agency. The district court rejected both these claims. We affirm the district court's decision, concluding that plaintiffs lack standing to challenge alleged procedural deficiencies in the administrative process, and that the agency's environmental assessment was not defective.

## I. BACKGROUND

### A. *Statutory Scheme*

The types of materials that may be used to package alcoholic beverages are regulated by two federal agencies, the Food and Drug Administration ("FDA") and the Bureau of Alcohol, Tobacco and Firearms ("Bureau"). Although these agencies serve diverse statutory goals, their respective regulatory domains partially overlap. Consequently, bottlers of alcoholic beverages must comply

with the dual sets of regulations promulgated by these agencies.

The FDA is charged with the primary responsibility of safeguarding the lives and health of consumers of foods and drugs. The Federal Food, Drug, and Cosmetic Act prohibits the use of a "food additive" unless that use conforms to FDA regulations.[1] Alcoholic beverages are foods,[2] and liquor bottles are considered additives[3] under the definitional sections of this Act. Consequently, distillers wishing to bottle alcoholic beverages using a packaging material not currently on the market must seek FDA approval before using the new substance.

This process is usually commenced by filing a food additive petition with the FDA, which then publishes a notice in the Federal Register. After evaluating the potential impact on the public health and safety of the use of the proposed substance, as well as considering the accompanying environmental effects, the petition is either granted or denied. Approval of the petition is usually effectuated by an amendment to the FDA's food additive regulations permitting anyone to use the newly approved packaging material subject to any limitations or guidelines contained in the amended regulations.[4]

The second series of regulations governing the packaging of alcoholic beverages exists to regulate tax revenues. The United States levies a tax on each gallon of distilled spirits produced in or imported into the United

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[1] 21 U.S.C. § 348 (1982).

[2] "The term 'food' means (1) articles used for food or drink for man or other animals . . . ." *Id.* § 321(f) .

[3] "The term 'food additive' means any substance . . . intended for use in . . . packaging, transporting, or holding food . . . ." *Id.* § 321(s).

[4] *See generally* Brief for Federal Appellees at 1-2; Brief for Intervenor-Defendant Appellee the Society of the Plastics Industry, Inc. at 4-5, 17-18.

States, based on the volume of alcohol contained in the beverage.[5] The Secretary of the Treasury is charged with the responsibility of collecting these revenues. Because the intergrity of the packaging materials can have a direct effect on the volume of alcohol and, consequently, the amount of tax to be collected, the use and refilling of liquor bottles are strictly regulated.[6] Under authority delegated by the Secretary of the Treasury,[7] "whenever in [its] judgment such action is necessary to protect the revenue," the Bureau is authorized (1) "to regulate the kind, size, branding, marking, sale, resale, possession, use, and reuse of containers . . . designed or intended for use for the sale of distilled spirits," and (2) to require persons manufacturing these containers to submit to inspections, to keep records, and to file reports as prescribed by the Bureau regulations.[8] Regulations promulgated by the Bureau pursuant to this authorization require that containers used for liquor bottles be made from materials which it has approved as adequately protecting tax revenues.

B. *Current Controversy*

In 1973, after notice and comment rulemaking proceedings, the FDA approved the use of polyethylene terephthalate plastic in containers used for alcoholic beverages not exceeding fifty percent alcohol by volume. These beverages include beer, wine, and many liquors falling within the Bureau definition of distilled spirits.[9] Anticipating that several distillers might eventually request clearance to use this type of plastic in packaging distilled spirits, in 1976 the Bureau issued an industry circular

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[5] *See* 26 U.S.C. § 5001(a)(1) (1982).

[6] *Id.* § 5301(c).

[7] 37 Fed. Reg. 11,696 (10 June 1972).

[8] *See* 26 U.S.C. § 5301(a) (1982).

[9] *See id.* § 5002(a)(8).

notifying proprietors of distilled spirits plants of the procedures to be followed to obtain authorization to use new plastic compounds in liquor bottles. These steps included submitting sample bottles for use in Bureau testing, and providing verification that the plastic packaging compound meets all applicable FDA requirements for packaging alcoholic beverages.[10] The Bureau also noted in this circular that the National Environmental Policy Act would require the Bureau to prepare a study of possible environmental effects caused by use of the proposed plastic packaging material.

Apparently no formal distillers' applications to use polyethylene terephthalate plastics were filed until 27 October 1980 and 26 October 1981. On these dates two distillers requested Bureau clearance to use polyethylene terephthalate ("PET") in packaging their distilled spirits. On 8 June 1981, the Glass Packaging Institute ("GPI") requested that the Bureau conduct an informal rulemaking on the issue of whether the Bureau's regulations should be amended to embrace PET liquor bottles.

No rulemaking proceeding was initiated in response to GPI's request. However, on 11 January 1982 the Bureau notified the public of its intent to prepare an environmental assessment on the use of PET in liquor bottles. GPI filed comments, urging that the manufacturing of PET containers would consume too much energy, that the use of PET in packaging could be carcinogenic, that incineration of discarded PET bottles would release harmful gases, and that disposal of solid wastes would present additional environmental hazards. These and other environmental objections were taken under advisement by the FDA. Well after the close of the period for filing written comments, and only approximately two weeks before the initial environmental evaluation was due to be released,

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[10] Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, *Industry Circular*, No. 76-19, 25 August 1976, §§ 3.1, 3.2, 4.02, *reprinted at* Joint Appendix ("J.A.") 45-46.

GPI also sought to notify the Bureau about the environmental threat posed by the alleged tamperability of PET bottles. This concern was prompted by nationally publicized news stories about unrelated incidents of tampering with nonprescription pain medicines. GPI's attempts to schedule a meeting with the Bureau on the issue of PET tamperability were unsuccessful.

On 5 October 1982, without specifically mentioning the two pending requests for PET clearance, the Bureau issued a final rule effective 5 November 1982 amending its definition of a permissible liquor bottle. The previous definition permitted distillers to use liquor bottles made of "glass, or earthenware, or other suitable material approved by the Director [of the Bureau]."[11] The new regulation authorized liquor bottles "made of glass or earthenware, or of other suitable material approved *by the Food and Drug Administration* . . . and which has been determined by the Director [of the Bureau] to adequately protect the revenue."[12] The rule codified the Bureau's longstanding practice of deferring to FDA expertise on the health and safety issues associated with approval of new packaging materials.[13]

Because the FDA had previously approved PET for use in liquor bottles, the final rule arguably permitted distillers to begin manufacturing PET liquor bottles subject to FDA regulations. However, at this point, the Bureau had not ruled on whether PET would adequately protect tax revenues. Neither had a final environmental assessment been issued.

One day before the final rule was to become effective GPI filed suit in the United States District Court seeking

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[11] *See* 26 C.F.R. § 175.17 (Revised, 1955); J.A. 104; Brief for Federal Appellees at 2.

[12] *See* 47 Fed. Reg. 43,947 (1982), codified at 27 C.F.R. § 19.11 (1983) (emphasis added).

[13] 47 Fed. Reg. 43,946 (1982); J.A. 66.

to enjoin the Bureau from approving PET liquor bottles. GPI initially sought to overturn the approval of PET on three grounds. First, it contended that the Bureau's failure to conduct an informal rulemaking proceeding before approving PET liquor bottles violated the Administrative Procedure Act. Second, it charged that the Bureau's failure to prepare an environmental impact statement was inconsistent with the National Environmental Policy Act. Finally, GPI asserted that the Bureau had violated its own regulations by failing to determine whether PET would adequately protect revenue. The plaintiffs' motion for a temporary restraining order based on these grounds was denied on 4 November 1982.

On 4 November 1982 the Bureau released a final environmental assessment which concluded that use of PET liquor bottles would not have a significant environmental effect. That assessment did not discuss the susceptibility of PET bottles to criminal tampering. Later in November 1982, the Bureau also issued a ruling that use of PET liquor bottles would not adversely affect revenue collection, and could lawfully be used to package distilled spirits.[14]

On 28 February 1983, in response to the defendants' motion for summary judgment, United States District Judge Norma Holloway Johnson dismissed the plaintiffs' suit. The district court ruled that subsequent to the filing of the suit the agency properly concluded that PET would protect revenues, a point which GPI conceded.[15] The court also held that the Bureau had acted lawfully under the National Environmental Policy Act when it determined that an environmental impact statement was unnecessary. Finally, the court rejected the claim that an

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[14] *See* Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, *Industry Circular*, No. 82-14, 22 Nov. 1982, *reprinted at* J.A. 209.

[15] J.A. 254-55.

informal rulemaking was required by the Administrative Procedure Act, holding that the approval of PET was merely an interpretive rule, exempt from notice and comment rulemaking.[16] GPI then brought this appeal, contending that the court erred in its treatment of the environmental and procedural issues.

## II. Discussion

### A. *Procedural Claim*

Plaintiffs argue that the Bureau's amendment of its regulations to permit the packaging of distilled spirits in PET containers constitutes a substantive rule. They allege that the agency's failure to conduct notice and comment procedures before promulgating that rule allegedly violates Section 4 of the Administrative Procedure Act.[17] However, before we reach the merits of these contentions we must consider the plaintiffs' standing to raise this issue.

The exercise of judicial power under Article III is subject to several preconditions which, under the rubric of standing, help assure that the Judicial Branch fills its proper role under the tripartite system of powers envisioned under the Constitution. Among these preconditions, the Supreme Court has articulated several irreducible constitutional requirements which a plaintiff must meet before he is entitled to obtain relief in federal courts. All plaintiffs must demonstrate an actual or threatened injury caused by the allegedly illegal conduct of the defendant which can be fairly traced to the challenged action, and which is likely to be redressed by a favorable decision.[18] In addition to these constitutional

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[16] J.A. 258.

[17] 5 U.S.C. § 553 (1982).

[18] *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

requirements, several prudential principles also caution against exercise of judicial power.[19] Thus, the Supreme Court has generally required that a plaintiff's alleged injury at least arguably fall "within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[20] Unless these constitutional and prudential standing requirements are satisfied by GPI or William W. Sadd we may not reach the merits of their claims.

The injury allegedly caused by the challenged approval of PET liquor bottles is the potential loss of revenues from the production and sale of glass liquor bottles which would occur if PET liquor bottles are allowed to compete in the liquor bottle market.[21] This is clearly a concrete, individualized injury which is directly attributable to the Bureau's approval of PET liquor bottles. Because distillers are unable to use PET packaging in the absence of Bureau approval, invalidation of the challenged regulations would avert the threatened injury. Thus, the district court correctly held that the constitutionally-grounded standing requirements are satisfied by plaintiffs' allegations.

However, neither the district court nor the parties below gave much consideration to whether the injury alleged as the basis for plaintiffs' procedural claim satisfies the zone of interests requirement. This omission is critical, since the zone of interests test implicates many

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[19] *Id.* at 475; *American Friends Service Comm. v. Webster*, 720 F.2d 29, 51 (D.C. Cir. 1983).

[20] *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982) (quoting *Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 153 (1970)).

[21] Amended Complaint for Declaratory and Injunctive Relief ¶ 33, J.A. 156.

of the same policies which underlie the constitutional standing requirements.[22]

The zone of interests test is the element of standing which focuses on the relationship between the statute on which the claim is based and the alleged injury.[23] As we explained in *Copper & Brass Fabricators Council, Inc. v. Department of the Treasury,* this test "requires some indicia—however slight—that the litigant before the court was intended to be protected, benefitted or regulated by the statute under which suit is brought."[24] Here, the statute GPI invokes is 26 U.S.C. § 5301(a). The interest advanced by the plaintiffs is "the right to market distilled beverage containers free of competition from containers approved in an illegal fashion."[25] Unless there is some indication that this competitive interest is one protected or regulated under Section 5301(a), plaintiffs' claim cannot qualify under the zone of interests test.

Section 5301(a) states: "*Whenever in* [*its*] *judgment such action is necessary to protect the revenue,* the [Bureau] is authorized . . . (1) to regulate the kind . . . of containers . . . intended for use for the sale of distilled spirits . . . and (2) to require, of persons manu-

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[22] *Compare Tax Analysts & Advocates v. Blumenthal,* 566 F.2d 130, 140 (D.C. Cir. 1977), *cert. denied,* 434 U.S. 1086 (1978) (zone of interests test intended to assure congruence between exercise of judicial power and mandate of legislative branch) *with Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 473-75 (1982) (prudential standing principles framed with a view to Article III policies, such as the balanced relationship between coequal arms of Federal Government).

[23] *See Association of Data Processing Service Orgs. v. Camp,* 397 U.S. 150, 153 (1970).

[24] 679 F.2d 951, 952 (D.C. Cir. 1982).

[25] Appellants' Supplemental Brief Addressing the Question of Standing at 11.

facturing . . . such containers, the submission to . . . inspection . . . ." [26] By its terms, this section does not directly authorize the Bureau to regulate competition among manufacturers of liquor bottles. Its sole objective is that of safeguarding the revenues derived from gallonage liquor taxes. The plaintiffs do not suggest that other interests are protected. Indeed, they admit that "Section 5301(a), in its entirety, *is a single statutory provision with a single purpose.* . . . [T]he entire provision was drafted to enable the Secretary to 'protect the revenue.' " [27] The regulation of competition among liquor bottle manufacturers is simply not one of the direct statutory interests protected by the statute on which plaintiffs rely.

It is also clear that competition among container manufacturers, as such, is not an indirect statutory objective, since there is no relationship between *who* makes the bottles and the *amount* of revenues recovered. Plaintiffs have not argued that an adverse impact on one category of bottle manufacturers could negatively affect the total revenues raised. The Bureau's statutory obligation is to ensure that the physical integrity of the container adequately protects the taxable commodity, alcohol, from undue variation; it has no obligation to guarantee or regulate the financial or competitive status of the industries and companies which undertake to manufacture liquor bottles. The plaintiffs' asserted interest in protecting their competitive position from vitiation caused by the allegedly illegally authorized entry of other potential competitors falls well outside the zone of interests protected or regulated by Section 5301(a).

Plaintiffs have not identified an injury to any other interest which could come within the zone protected by

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[26] 27 U.S.C. § 5301(a) (1982).

[27] Appellants' Supplemental Brief Addressing the Question of Standing at 6-7 n.6.

this section.[28] In their brief on this issue they focus on the fact that as manufacturers of containers for distilled beverages, their products are regulated by the Bureau. However, our prior decisions make it clear that mere regulatory impact on a party's commercial interests causing a diminished competitive status does not satisfy the zone of interests test when that competitive status is not an interest arguably regulated by the statute forming the basis for the action.

We recently faced a similar situation in *Copper & Brass Fabricators Council, Inc. v. Department of the Treasury*,[29] which dealt with a challenge by a trade association of copper manufacturers to the Treasury Department's decision to decrease drastically the copper content of the penny, replacing it with zinc. The enabling statute authorized the Secretary of the Treasury "to prescribe the copper and zinc composition 'as he may deem appropriate' and as is 'necessary in order to assure an adequate supply of coins to meet national needs.' "[30] It was thus evident that there was no congressional interest to protect, benefit or regulate the copper fabricators. Although the challenged agency action had an adverse regulatory impact on the copper fabricators, who lost to the newly favored zinc producers a substantial

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[28] At oral argument, plaintiffs asserted that their claim was related to the statutory interest in protecting revenue. This is belied by their failure to challenge on appeal the Bureau's ruling that PET packaging adequately protects tax revenues. Moreover, they have not alleged how any reduction in revenues could inflict upon them an injury distinct from the generalized harm suffered by all citizens when the flow of revenues to the Treasury is restricted. There is no universal standing to assert this type of generalized claim. *See Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 473-75 (1982); *Capital Legal Foundation v. Commodity Credit Corp.*, 711 F.2d 253, 260 (D.C. Cir. 1983).

[29] 679 F.2d 951 (D.C. Cir. 1982).

[30] *Id.* at 952 (quoting 31 U.S.C. § 317(b) (1976)).

share of the government's coin metal purchases, the exercise of discretionary authority to reduce United States copper consumption for reasons totally unrelated to the competitive status of copper fabricators was insufficient to place the copper fabricators within the zone of regulated interests.

The similarities between *Copper & Brass Fabricators* and the instant case are striking. Here the Bureau has exercised its discretionary authority to permit use of a new class of distilled spirits packaging which protects tax revenue. GPI's position is thus analagous to that of the copper fabricators' trade association—it has potentially lost a share of its preexisting market. However, because the statutory parameters guiding the Bureau's exercise of regulatory authority are totally irrelevant to the competitive impact of the decision on those manufacturers selling the regulated substance, the plaintiffs fail to come within the zone of interests arguably protected, benefitted or regulated by Section 5301(a). GPI's injury, a potential loss of revenue due to increased competition from PET liquor bottles, plainly is not an interest which Congress authorized the Bureau to regulate or protect.

Our decision in *Control Data Corp. v. Baldridge*,[31] also demonstrates that the zone of interests test is not satisfied. In *Control Data* a group of automatic data processing equipment manufacturers challenged regulations promulgated by the Secretary of Commerce that established certain technical specifications to which automatic data processing equipment had to conform in order to compete for government procurement contracts. Because the standards were similar to those then met by one segment of the industry, the remaining segment suffered a potentially severe injury to its competitive position since it would have been forced to spend large sums of

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[31] 655 F.2d 283 (D.C. Cir.), *cert. denied*, 454 U.S. 881 (1981).

money to modify its equipment specifications in order to continue to compete in the government data processing market. The statute under which the regulations were enacted specifically authorized the government to set uniform technical standards, and to increase competition among suppliers.

Nevertheless, we held that the plaintiffs' claim was not within the relevant zone of interests. It was not sufficient that the plaintiffs were regulated by the agency rules to the extent that they had to conform to the applicable technical specifications in order to compete in a particular market. Rather the plaintiffs were required to show that the interest allegedly injured—their competitive status as data processing equipment manufacturers—was an interest which Congress at least arguably had required the agency to protect or regulate. The statute authorized the agency to establish uniform technical specifications and promote industry competition, but only to the extent necessary to produce the lowest possible procurement prices for the United States Government.[32] The regulatory impact was only the means through which the single statutory end was promoted. Thus, there was no indication that Congress intended to place the plaintiffs within the zone of interests protected or regulated by the statute.

Like the manufacturers in *Control Data*, GPI has potentially suffered an injury to its competitive interests. The statute authorizing agency action indicates a congressional interest to regulate only a specific narrow governmental interest—protection of tax revenues—similar to the intent to reduce procurement costs in *Control Data*. Section 5301(a) is not a general mandate to monitor or protect the competitive status or financial health of the affected industry. Because there are no indicia that these competitive interests were to be regulated by the Bureau

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[32] *Id.* at 295.

under Section 5301(a), the plaintiff's injury is not arguably within the zone of interests, as required by the Supreme Court.[33]

This result is consistent with the general guidelines established by our other cases discussing the zone of interests standard.[34] The plaintiffs have advanced no compelling reasons why this prudential standing barrier should be relaxed. Without disparaging the genuineness of GPI's attempt to rectify alleged procedural irregularities in the Bureau's rulemaking, the interest which propelled it into the courts, preservation of a de facto dominant market position, is simply not one which Section 5301(a) was intended to protect or regulate. In these circumstances we hold that the plaintiffs lack standing to challenge the procedural validity of the Bureau's decision to permit distillers to package distilled spirits in PET bottles.[35]

B. *Environmental Claim*

The National Environmental Policy Act ("NEPA") requires Federal agencies to compile a complete environ-

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[33] *Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 153 (1970).

[34] *See, e.g., Tax Aanalysts & Advocates v. Blumenthal*, 566 F.2d 130, 143 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978) (domestic oil producers' competitive interests not protected under Internal Revenue Code); *Committee for Auto Responsibility v. Solomon*, 603 F.2d 992 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 915 (1980) (injuries to health and environmental interests were not protected by legislation intended solely to improve government property procurement and administration). GPI's claim is unlike those where the protected interest allegedly injured was discernible from the relevant statute as a regulatory objective. *See Howes Leather Co. v. Carmen*, 680 F.2d 818, 820-21 (D.C. Cir. 1982).

[35] *Cf. Capital Legal Foundation v. Commodity Credit Corp.*, 711 F.2d 253 (D.C. Cir. 1983) (organization which was denied opportunity to comment due to allegedly illegal administrative procedures was nevertheless outside relevant zone of interests).

mental impact statement on all "major Federal actions significantly affecting the quality of the human environment." [36] That report must consider, *inter alia*, the "environmental impact of the proposed action" and "any adverse environmental effects which cannot be avoided should the proposal be implemented." [37]

In discharging this statutory responsibility the Bureau prepared an environmental assessment of its decision to permit the use of PET liquor bottles. The assessment considered written comments raised by plaintiffs and others in response to the agency's public solicitation of comments on the potential environmental effects associated with use of PET liquor bottles. It concluded that approval of PET liquor bottles would not cause a significant environmental effect, and that no environmental impact statement was necessary. The district court upheld the legality of the Bureau's decision not to file an environmental impact statement based on the factors it considered.

The plaintiffs have not appealed this finding.[38] Rather, they argue that the Bureau erred by failing to consider an entirely separate impact which plaintiffs neglected to bring to the Bureau's attention during the written comment process. Specifically, the plaintiffs claim that a deranged criminal could inject poisons through the plastic walls of PET bottles, thus dangerously affecting human health. They suggest that the Bureau's omission to evaluate this alleged environmental effect was fatal to the Bureau's decision not to prepare an environmental im-

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[36] *See* 42 U.S.C. § 4332(2)(C) (1976).

[37] *Id.* § 433(2)(C)(i)-(ii).

[38] The plaintiffs have standing to raise this issue since plaintiff William W. Sadd alleged that he may consume distilled spirits packaged in PET, potentially subjecting him to health injuries resulting from contaminated liquor in compromised PET bottles. That injury, if cognizable as an environmental effect, would fall within the zone of protected interests under NEPA.

pact statement. The district court rejected this claim on the ground that the plaintiffs had failed to bring it to the Bureau's attention before release of the environmental assessment.

We reject the plaintiffs' NEPA claim as specious. No cognizable *environmental* effect is implicated by the introduction of a new plastic container into the market place merely because it may be susceptible to tampering. The policies served by NEPA are too important to be diluted as plaintiffs would have us do.[39] The Supreme Court has cautioned that

> NEPA does not require the agency to assess *every* impact or effect of its proposed action, but only the impact or effect on the environment. If we were to seize the word "environmental" out of its context and give it the broadest possible definition, the words 'adverse environmental effects' might embrace virtually any consequence of a governmental action that someone thought "adverse." [40]

By claiming that injury caused by ingestion of criminally adulterated food is an adverse environmental impact, the plaintiffs offer a definition of environment even broader than that rejected by the Supreme Court, extending the scope of "environment" well beyond any reasonable interpretation of the "natural and physical environment" [41] encompassed under NEPA.

The plaintiffs contend that NEPA requires consideration of environmental effects caused by reasonably foreseeable criminal acts of third parties. However, mere foreseeability does not trigger a duty to consider an alleged environmental effect. The limits to which NEPA's

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[39] *Metropolitan Edison Co. v. People Against Nuclear Energy*, 103 S. Ct. 1556, 1562 (1983).

[40] *Id.* at 1560.

[41] 40 C.F.R. § 1508.14 (1983).

causal chain may be stretched before breaking must be defined by the policies and legislative intent behind NEPA.[42] NEPA is meant to supplement federal agencies' other nonenvironmental objectives,[43] not to transplant specific regulatory burdens from those expert agencies otherwise authorized to redress specific nonenvironmental problems and pointlessly to reimpose those objectives on other unqualified agencies. In this case the FDA already has the specific statutory authority to address issues of tamperability. Several provisions of the Federal Food, Drug, and Cosmetic Act prohibit "adulteration" of food, which includes the addition of "any poisonous or deleterious substance which may render it injurious to health."[44] The Federal Anti-Tampering Act[45] makes it a federal crime to inject poison in foods. That Act specifically empowers the FDA to investigate violations of the Act involving products subject to FDA regulation,[46] such as liquor sold in PET bottles. In light of this specific congressionally conferred FDA mandate to control tampering with foods, drugs, and other consumer products, it would be absurd to hold that susceptibility to tampering is an environmental health risk which the Bureau and every other agency must consider in making an environmental assessment.

*Hanly v. Kleindienst*[47] is not to the contrary. This case and its progeny establish only that NEPA protects

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[42] *Metropolitan Edison Co. v. People Against Nuclear Energy*, 103 S. Ct. at 1561 n.7.

[43] *See* 42 U.S.C. § 4335 (1976).

[44] 21 U.S.C. § 331(b), (k) (1983).

[45] 97 Stat. 831 (13 Oct. 1983).

[46] *Id.* at 832; *see* 18 U.S.C.A. § 1365(f) (Supp. Pamphlet 1966-1983).

[47] 471 F.2d 823, 834 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973). *See also Hanly v. Mitchell*, 460 F.2d 640, 647 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972).

quality of life for city residents.[48] In *Hanly*, residents of a neighborhood objected to the concentrated criminal activity that could take place in the immediate vicinity of a new jail. There is no similarity between that drastic and localized change in a specific neighborhood locale, and the diffused, generalized health effects said to occur in this case, where millions of plastic food and drug containers are already marketed nationwide. We seriously doubt whether Congress fashioned NEPA as an administrative incarnation of the policeman's squad car, roving the streets in search of sporadic criminal activity which may occasionally occur in the aftermath of an agency action, there to arrest the criminal in the name of "environmental protection."

A decision that no significant environmental impact will occur is buttressed by the conformity of the proposed federal action to federal regulations governing other aspects of that action's interrelationship with the physical environment.[49] The FDA has previously rejected contentions that risk of tampering by injection through plastic-walled drug containers is significant.[50] Thus, the Bureau's failure to consider tamperability would not necessarily require compilation of an environmental impact statement.

Moreover, social side effects of agency action, standing alone, do not require development of an environmental impact statement. Applicable regulations state that

> *economic or social effects are not intended by themselves to require preparation of an environmental*

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[48] *See Realty Income Trust, Inc. v. Eckerd*, 564 F.2d 447, 452 n.10 (D.C. Cir. 1977).

[49] *See Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 861 (9th Cir. 1982); *Maryland-National Capital Parks & Planning Comm'n v. U.S. Postal Serv.*, 487 F.2d 1029, 1036-37 (D.C. Cir. 1973).

[50] *See* 48 Fed. Reg. 16,658, 16,662 (1982).

> *impact statement.* When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.[51]

The Bureau has already ruled that the potential physical and natural consequences of PET approval, such as those raised by plaintiffs and others in their written comments, do not require an environmental impact statement. The plaintiffs do not now challenge the district court's unqualified approval of the Bureau's treatment of these points. Thus, even if, contrary to our holding, the possibility of such minor social side effects as criminal tampering activity could be considered environmental impacts, that possibility would not tip the scale to require preparation of an environmental impact statement.[52]

Finally, the untimely manner in which plaintiffs raised the issue of tamperability also precludes us from overturning the Bureau's decision not to file an impact statement. The plaintiffs made no attempt to raise this claim until the final weeks of October 1982, at least eight months after the written comment period had expired, and less than two weeks before the environmental assessment was to be released. Even then, the plaintiffs' efforts to inform the Bureau of these issues, which apparently took the form of attempts "to schedule a meeting," [53] did not actually inform the Bureau of this risk. Consequently,

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[51] 40 C.F.R. § 1508.14 (1983).

[52] *See Como-Falcon Community Coalition, Inc. v. United States Dep't of Labor*, 609 F.2d 342, 345 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980); *Goodman Group, Inc. v. Dishroom*, 679 F.2d 182, 185 (9th Cir. 1982); *Image of Greater San Antonio, Texas v. Brown*, 570 F.2d 517, 522 (5th Cir. 1978); *National Ass'n of Government Employees v. Rumsfeld*, 413 F. Supp. 1224, 1230 (D.D.C. 1976), *aff'd mem.*, 556 F.2d 76 (D.C. Cir. 1977).

[53] Brief for Appellants at 28.

the district court found that the plaintiffs failed to raise the issue with the Bureau before release of the environmental assessment. On appeal, the plaintiffs have offered no factual basis on which to overturn this finding. Failure to raise the claim or to seek reconsideration of the environmental assessment precludes the plaintiffs from now raising the issue.[54]

The plaintiffs' only justification for their tardy attempts to notify the Bureau is that container tamperability could not reasonably have been anticipated prior to the close of the written comment period when tampering of other consumer products briefly became the focus of national publicity. We doubt that the unrelated, highly publicized incidents of tampering relied upon by the plaintiffs suddenly brought the tamperability of PET within the realm of realistically probable consequences. But even accepting this much, the plaintiffs' argument appears to be that the Bureau had a mandatory duty to supplement its environmental assessment. However, such a duty is triggered only when the available new information is sig-

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[54] *Recreational Vehicle Industry Ass'n v. EPA*, 653 F.2d 562, 573 (D.C. Cir. 1981); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. 1973), *cert. denied*, 417 U.S. 921 (1974). Cases cited by plaintiffs for the opposite proposition are readily distinguishable. Unlike *Athlone Industries, Inc. v. Consumer Product Safety Comm'n*, 707 F.2d 1485 (D.C. Cir. 1983), exhaustion of administrative remedies was not obviously futile and would have served several policies underlying the exhaustion doctrine, including granting the agency an opportunity to apply its expertise and discretion to GPI's admittedly novel claim. Dictum in *Izaac Walton League of Am. v. Marsh*, 655 F.2d 346, 369 n.56 (D.C. Cir.), *cert. denied*, 454 U.S. 1092 (1981) does not even discuss the exhaustion doctrine. *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1384-85 (2d Cir.), *cert. denied*, 434 U.S. 1064 (1978) permitted new evidence to be considered when the necessity of presenting the evidence was not apparent until after release of the agency's environmental evaluation, and was necessary to rebut other agency findings in the environmental impact statement. In this case, the significance of tamperability, if relevant at all, was not dependent upon other previously undisclosed evaluations made in the environmental assessment.

nificant.[55] Significance is based on a variety of factors including the empirical value of the new evidence and its potential effect on the agency's other calculations.[56] Here, the generalized threat of tampering was of questionable value indeed. Although plastic containers had been marketed for years, the plaintiffs' concerns were not triggered by the release of a significant study on the occurrence of tampering with plastic beverage containers, but only by the weak anecdotal evidence that other consumer products are currently subject to tampering. This minimal information was offered only at the conclusion of the administrative process, when agency attention had certainly shifted from evaluation of comments to final preparation and drafting of the assessment. The Supreme Court has cautioned against upsetting well-considered agency decisions based on scanty new evidence of alleged problems, and our court has been careful to follow its warning:

> Administrative consideration of evidence . . . always creates a gap between the time the record is closed and the time the administrative decision is promulgated [and, we might add, the time the decision is judicially reviewed]. . . . If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening.[57]

The plaintiffs' allegations of tamperability are neither substantially based, nor were they ever brought to the attention of the agency. The occurrence of unsimilar

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[55] *See Friends of the Rivers v. Federal Energy Reg. Comm'n*, 720 F.2d 93, 109 (D.C. Cir. 1983).

[56] *Id.*

[57] *Id.* (quoting *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 554-55 (1978)).

tampering incidents at the conclusion of the agency decision making process forms no basis for remanding this proceeding to the Bureau for supplementation of its environmental assessment.

## III. Conclusion

The Bureau of Alcohol, Tobacco and Firearms administratively cleared the packaging of distilled spirits in PET bottles after determining that PET packaging will adequately protect United States liquor tax revenues. In this appeal GPI does not object to this specific conclusion, but seeks instead to redress the potential injury to its competitive status by attacking the Bureau's decision, made without notice and comment, to amend its rules to require advance FDA approval of new packaging materials. However, GPI's competitive injury is totally dissimilar to the narrow zone of interests contemplated by the statute relied upon by GPI, which focuses on the protection of tax revenues and not the regulation of industry competition. That disjunction between injury and statutorily grounded zone of interests precludes GPI's standing to challenge the process adopted by the Bureau to amend its rules.

The plaintiffs' belated alternative attempt to attack the Bureau's decision as environmentally unsound based on purported new evidence of tampering is transparently flawed. Although tampering may pose a consumer health risk, it is definitely not an environmental consequence under any reasonable interpretation of the National Environmental Policy Act. Even if it were, the evidence of the harm was insubstantial, and never placed squarely before the agency.

The plaintiffs have advanced no legitimate grounds for interfering with the Bureau's exercise of its authority to permit distillers to package distilled spirits in PET bottles. The decision of the district court is

*Affirmed.*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 82-3142

GLASS PACKAGING INSTITUTE, *et al.*,
*Plaintiffs*,

v.

DONALD T. REGAN, *et al.*,
*Defendants*.

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[Filed Mar. 3, 1983]

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## MEMORANDUM OPINION

Plaintiffs Glass Packaging Institute, a trade association of manufacturers of glass bottles, and William W. Sadd filed suit on November 3, 1982, against Secretary Regan in his supervisory capacity of the Bureau of Alcohol, Tobacco, and Firearms (BATF) to prevent the introduction of plastic containers for distilled spirits. Plaintiffs sought a temporary restraining order to block the approval of plastic containers because BATF had failed to conduct an informal rulemaking proceeding, to prepare an environmental impact statement (EIS), and to determine whether plastic was a suitable container for distilled spirits. On November 4, 1982, plaintiffs' application for a temporary restraining order was denied and an oral opinion was issued* Shortly thereafter, BATF

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* At the hearing on plaintiffs' application for a temporary restraining order, the Court granted the oral motion to intervene of the Society of the Plastics Industry, Inc. (SPI). Because of plain-

made the determination that plastic was a suitable container for distilled spirits. *See* Industry Circular No. 82-14 (Nov. 12, 1982).

This matter is now before the Court on defendants' motion for summary judgment.** While summary judgment should be employed to avoid useless trials where there are no genuine issues of fact in dispute, *see* Fed. R. Civ. P. 56, "summary judgment is a lethal weapon, and courts must be mindful of its aims and targets and beware of overkill in its use." *Brunswick Corp. v. Vineburg*, 370 F.2d 605, 612 (5th Cir. 1967). In ruling on a motion for summary judgment, a court should confine its inquiry to determining whether a genuine, triable issue of fact exists, and should not attempt to resolve prematurely bonafide factual disputes under the guise of a Rule 56 disposition. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). It is clear that the moving party bears the burden of demonstrating that there are no genuine issues of material fact and that the movant is accordingly entitled to judgment as a matter of law. *See Bloomgarden v. Coyer*, 479 F.2d 201, 206-07 (D.C. Cir. 1973); *Nyhus v. Travel Management Corp.*, 466 F.2d 440, 442 (D.C. Cir. 1972). Despite these cautionary principles, defendants are entitled to summary judgment for the ensuing reasons.

## DISCUSSION

Before discussing the challenges to the Administrative Procedure Act (APA) and the National Environmental

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tiffs' view that the granting of the oral motion did not admit SPI a party in this litigation, the Court granted SPI's written motion to intervene on December 27, 1982, and SPI is an intervenor-defendant in this litigation.

** Plaintiffs have filed a motion for preliminary injunctive relief. The disposition of defendants' motion for summary judgment necessitates that plaintiffs' motion for a preliminary injunction must be denied.

Policy Act (NEPA) to the approval by BATF of plastic containers for distilled spirits, it is important to consider what issues are no longer relevant because of actions that followed the denial of plaintiffs' application for a temporary restraining order. There are three issues which no longer have any bearing on the disposition of the instant suit. First, the Government's objections to plaintiffs' standing to raise the APA and NEPA claims have been satisfied by the allegations contained in the amended complaint. Second, plaintiffs have conceded that their claim concerning BATF's obligation to find plastic containers suitable for distilled spirits has been mooted by the BATF's determination of suitability on November 12, 1982. Third, plaintiffs have abandoned their challenge to the BATF's amendment to the definition of the term "liquor bottle." * Plaintiffs assert that because BATF has now recognized its erroneous view that determinations of suitability and compliance with NEPA were unnecessary before plastic containers could be used for distilled spirits, they have modified their argument to challenge the actual approval by BATF of plastic containers on APA and NEPA grounds. Apparently, plaintiffs failure to fully understand BATF's established role in approving new containers for distilled spirits led them to file a groundless application for a temporary restraining order due to an amendment to the definition of the term "liquor bottle." This amendment was nothing more than a policy statement of interpretive rule concerning the BATF's longstanding practice to delegate health con-

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* BATF's final rule that became effective on November 4, 1982, defined the term liquor bottle as follows:

> A bottle made of glass or earthware, or of other suitable material approved by the Food and Drug Administration, which has been designed or is intended for use as a container for distilled spirits for sale for beverage purposes and which has been determined by the Director to adequately protect the revenue.

*See* 47 Fed. Reg. 43, 947 (1982).

cerns to the Food and Drug Administration (FDA) and to incorporate the FDA's findings into a suitability determination. Plaintiffs will not be permitted to convey the misimpression that it was anyone other than they who precipitated this suit prematurely due to their misunderstanding of the administrative process.

## APA CLAIM

Plaintiffs maintain that BATF's approval of plastic containers should have been conducted through an informal rulemaking for two reasons. First, plaintiffs assert that the pervasive usage of the terminology "by regulation" in the statutes governing BATF's regulation of distilled spirits requires BATF to conduct an informal rulemaking before a new kind of container is approved. *See, e.g., Spring Mills, Inc. v. CPSC*, 434 F. Supp. 416, 430 (D.S.C. 1977). Second, plaintiffs maintain that BATF's endorsement of plastic containers for distilled spirits was a substantive rule that should have been formulated through an informal rulemaking. Neither argument is persuasive.

Plaintiffs rely on three statutory provisions to support their argument that Congress intended that an informal rulemaking would be held before BATF approved any new kind of container for distilled spirit. One of these provisions, however, is irrelevant because it applies exclusively to the industrial use of distilled spirits. *See* 26 U.S.C. § 5206(d) (1976). Another of the statutory provisions authorizes, but hardly mandates, BATF to promulgate regulations through informal rulemaking.* *See*

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* 26 U.S.C. § 5301(a) (Supp. IV 1980) provides:

> Whenever in his judgment such action is necessary to protect the revenue, the Secretary is authorized, by the regulations prescribed by him and permits issued thereunder if required by him—
>
> (1) to regulate the kind, size, branding, marking, sale, resale, possession, use, and reuse of containers . . . designed or

26 U.S.C. § 5301(a) (Supp. IV 1980). Hence, plaintiffs are left with a single statutory provision the sole purpose of which is to define the words "approved containers." *See* 26 U.S.C. 5001(a)(13) (Supp. IV 1980). Consequently, the presence of a solitary definitional provision that refers to the words "by regulation" falls far short of constituting pervasive usage of these words throughout the pertinent statute that would require BATF to conduct an informal rulemaking. Moreover, the Court declines to employ a purely definitional provision to override the statutory section that explicitly applies to BATF rulemaking and clearly acknowledges BATF's discretion to promulgate rules regarding the nature of containers for distilled spirits. *See* 26 U.S.C. § 5301(a) (Supp. IV 1980). In fact, Section 5301(a) specifically endorses BATF's issuance of permits that regulate the kinds of containers for distilled spirits, the precise manner in which BATF approved the use of plastic containers.

Despite the apparent congressional intent to permit BATF to promulgate rules and regulations concerning containers for distilled spirits at its discretion, plaintiffs maintain that BATF's approval of plastic containers was a substantive rule that required an informal rulemaking under the APA. Because the BATF ruling constitutes an interpretive rule, however, it is exempt from the notice and comment requirements of the APA. *See* 5 U.S.C. § 553(b)(3)(A) (1976). BATF has consistently viewed its rulings as official interpretations of the law that have no binding legal effect.* It has been a longstanding practice of the BATF to approve new materials for liquor

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intended for use for the sale of distilled spirits . . . for other than industrial use.

* 27 C.F.R. § 71.41(d)(2)(i)(A) (1982) provides that an ATF ruling "is an official interpretation by the Bureau that has been published . . . for the information and guidance of taxpayers, Bureau officials, and others concerned. ATF rulings represent the conclusions of the Bureau on the application of the law to the entire state of facts involved."

containers on a case-by-case basis through the issuance of interpretive rulings.** *See* Affidavit of William T. Drake, Assistant Director for Regulatory Enforcement, ¶ 4. *See, e.g.*, ATF Rulings 61-180 (aluminum), 66-193 (aluminum and tinplate), 70-36 (aluminum, tinplate, tinfree steel, and similar metals). As a result, BATF's approval of plastic containers for distilled spirits through an interpretive ruling followed a well-established administrative practice. BATF's characterization of its approval of materials for liquor containers as an interpretive ruling is entitled to significant deference. *See Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Cabais v. Egger*, 690 F.2d 234, 238 (D.C. Cir. 1982). Plaintiffs have failed to offer any justification beyond their desire to block the introduction of plastic containers to reject BATF's judgment. In addition, BATF's judgment is buttressed by the fact that its interpretive rulings are very similar to Internal Revenue Service (IRS) revenue rulings, *see* 26 C.F.R. § 601.601(d) & (e) (1982), that have been viewed as interpretive rules not subject to informal rulemaking. *See, e.g., Eastern Kentucky Welfare Rights Organization v. Simon*, 506 F.2d 1278 (D.C. Cir. 1974), *vacated on other grounds*, 426 U.S. 26 (1976). In sum, the congressional intent to place the decision to issue regulations in the BATF's discretion, the substantial deference merited by BATF's judgment to employ interpretive rulings to expand the list "of other suitable materials" for liquor bottles, and the similarity of BATF rulings to IRS revenue rulings that have been construed as interpretive rules exempt from the rulemaking requirements of the APA all compel the holding that BATF's approval of plastic containers for distilled spirits did not require notice and comment rulemaking.

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** These interpretive rulings refine the definition of "liquor bottle" which has been defined by regulation to be "made of glass or earthenware, or of other suitable material approved by the Director, designed or intended for use as a container for distilled spirits for sale for beverage purposes." 27 C.F.R. § 19.11 (1982).

## NEPA CLAIM

It is undisputed that BATF's approval of plastic containers for distilled spirits will have some impact on the environment. Nevertheless, it is within BATF's discretion not to conduct an environmental impact statement (EIS) if its environmental assessment suggests that no significant environmental impact will occur. Although BATF is obligated to take a "hard look" at the environmental effects of its actions, its decision not to prepare an EIS "is judicially vulnerable only when the agency has abused its discretion or has acted arbitrarily." *Committee for Auto Responsibility v. Solomon*, 603 F.2d 992, 1002 (D.C. Cir. 1979). *See Assure Competitive Transportation v. United States*, 635 F.2d 1301 (7th Cir. 1980). Plaintiffs challenge BATF's decision to do only an environmental assessment on three grounds: 1) the failure to consider adequately the production of hazardous gases due to the incineration of the plastic containers, the disposal of the solid wastes from these containers, and the energy consumption necessary for the production of the containers; 2) the failure to consider new evidence that plastic materials can be carcinogenic; and 3) the failure to mention the danger of tampering with plastic containers. A review of the administrative record demonstrates, however, that all of plaintiffs' objections are groundless.

Considering plaintiffs' first objection, BATF's environmental assessment carefully considered the environmental concerns of incineration of plastic containers, accumulation of solid waste, and the use of petrochemical resources. *See* Environmental Assessment of Polyethylene Terephthalate Liquor Bottles, at 16-17, 33-44 (Nov. 3, 1982). That BATF concluded that these environment effects were trivial is hardly surprising given the vast number of plastic containers presently utilized for foods and other beverages. As a result, the administrative record readily reflects that BATF took a "hard look" at the

aforementioned environmental concerns and properly concluded that preparation of an EIS was unnecessary.

Plaintiffs' second objection is equally groundless. Plaintiffs assert that BATF failed to consider new scientific evidence that plastic containers may be carcinogenic.* Yet, plaintiffs are attempting to resurrect an argument that has been repeatedly rejected. The FDA approved the use of plastic containers almost ten years ago. Only two weeks prior to the release of the environmental assessment, the FDA rejected the petition of the Natural Resources Defense Council to reconsider the approval of plastic containers due to allegedly new scientific evidence regarding potential carcinogenicity. Plaintiffs have failed to articulate why the FDA's scientific judgment should be rejected. Thus, the concern with the potential carcinogenicity of plastic materials has been repeatedly considered and resoundingly dismissed. An EIS is hardly necessitated by this concern.

Plaintiffs advance as their final objection the concern that third parties may be able to tamper with plastic containers. Plaintiffs have seized upon the Tylenol poisonings as an after-thought to block the introduction of plastic containers. Because of plaintiffs' failure to raise this concern before the release of the environmental assessment and their failure to file a petition for reconsideration based on this concern, plaintiffs are not entitled to raise the tampering issue now to have the administrative record remanded. *See, e.g., Recreation Vehicle Industry Ass'n v. EPA*, 653 F.2d 562, 573 (D.C. Cir. 1981). Moreover, it is dubious whether a concern with the criminal acts of third parties is even cognizable under NEPA. It is undisputed that plaintiffs have the ability, if they are genuinely concerned, to petition the FDA to assess

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* Given BATF's limited role in assessing only whether plastic containers will "protect the revenue," there can be no dispute that BATF was entitled to rely on the scientific expertise of the FDA in determining whether plastic containers could be carcinogenic.

the safety of plastic containers in light of the concern with tampering.

## CONCLUSION

There are no genuine issues of material fact present in this action and defendants are entitled to summary judgment. An Order consistent with this Memorandum Opinion has been issued.

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
United States District Judge

March 2, 1983

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 82-3142

GLASS PACKAGING INSTITUTE, *et al.*,
*Plaintiffs*,

v.

DONALD T. REGAN, *et al.*,
*Defendants.*

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[Filed Feb. 28, 1983]

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ORDER

Upon consideration of plaintiffs' motion for a preliminary injunction, defendants' motion for summary judgment, the respective oppositions, the accompanying memoranda of law, and the entire record herein, it is this 28th day of February, 1983,

ORDERED that plaintiffs' motion for a preliminary injunction be, and hereby is, denied; and it is further

ORDERED that defendants' motion for summary judgment be, and hereby is, granted; and it is further

ORDERED that the above-captioned case be, and hereby is, dismissed with prejudice.

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 82-3142

GLASS PACKAGING INSTITUTE, *et al.*,
*Plaintiffs*,

v.

DONALD T. REGAN, *et al.*,
*Defendants.*

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NOTICE OF APPEAL

Notice is hereby given this 31st day of March, 1983, that Plaintiffs Glass Packaging Institute and William W. Sadd hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the Order of this Court entered February 28, 1983, granting Defendants' Motion for Summary Judgment and denying Plaintiffs' Motion for Preliminary Injunction and ordering that the above-captioned case be dismissed.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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September Term, 1983

No. 83-1390

Civil Action No. 82-03142

GLASS PACKAGING INSTITUTE, *et al.*,
*Appellants*

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*

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[Filed Dec. 12, 1983]

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Before: Wilkey and Ginsburg, Circuit Judges; and MacKinnon, Senior Circuit Judge

ORDER

Upon consideration of appellants' motion for leave to file a supplemental brief addressing the question of standing, and of appellants' lodged supplemental brief, it is

ORDERED, by the Court, that appellants' aforesaid motion is granted and the Clerk is directed to file appellants' supplemental brief and to enter same on the docket. It is

FURTHER ORDERED, by the Court, that appellees may file a response to appellants' supplemental brief within ten (10) days from the date of this order.

*Per Curiam*

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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September Term, 1983

Civil Action No. 82-03142

No. 83-1390

GLASS PACKAGING INSTITUTE, *et al.*,
*Appellants*

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*

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[Filed Jan. 17, 1984]

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Before: Wilkey and Ginsburg, Circuit Judges; and MacKinnon, Senior Circuit Judge

ORDER

Upon consideration of appellees' (federal) motion for leave to file motion for enlargement of time, of appellees' lodged motion for extension of time [to file supplemental brief], and it appearing that appellees' supplemental brief has been received in the Clerk's Office, it is

ORDERED, by the Court, that appellees' aforesaid motion is granted and the Clerk is directed to file appellees' lodged motion for extension of time and appellees' lodged supplemental brief and to enter same on the docket.

*Per Curiam*

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk